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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	CC Docket No. 96-128
Reclassification and Compensation Provisions	)	
of the Telecommunications Act of 1996	)	

To: The Commission

REPLY COMMENTS OF COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

In this remand proceeding, the Commission must establish a per-call compensation rate that is fair to every interested party, the PSP, the carrier, and the consumer that ultimately must pay for it. Although the Court of Appeals reversed the Commission for its failure to take cost differences into account in setting a compensation rate, the PSPs continue to argue that the FCC can set compensation without reference to costs. Non-cost based compensation violates Section 276 and is inconsistent with the Court's remand. In particular, the additional surrogates suggested by APCC suffer from the same defect fatal to the Commission's reliance on local coin rates. Each of these surrogates includes significant costs which are not incurred in the origination of access code and subscriber 800 calls. Accordingly, APCC's proposed surrogates, like the local coin rate, are not reasonable approximations of the cost of originating compensable calls. Compensation based upon these surrogates would be arbitrary and capricious.

The record establishes that cost-based compensation set at the PSPs' incremental cost in originating access code and subscriber 800 calls will fully and fairly compensate PSPs. As a result of the Commission's decision to deregulate local coin rates, PSPs have the opportunity to generate over $230 per payphone per month *solely* from local coin and 1+ sent-paid calls. This amount (which excludes the substantial revenues PSPs also receive from 0+ calls) is sufficient to ensure PSPs can recover the total costs they claim for their payphones. Additional revenue based upon the incremental cost incurred in originating access code and subscriber 800 calls will ensure that every call provides at least a fair amount of compensation. CompTel estimates that PSPs' incremental costs are no more than $.03 to $.05 per call.

Alternatively, even if access code and subscriber 800 compensation is set at PSPs' total direct costs, rather than incremental costs, compensation should be no more than \$.10 per call. PSPs have relied upon inflated and irrelevant costs in the cost data submitted to the Commission. After removing irrelevant costs such as PSPs' long distance transmission charges and commissions on 0+ calls, the record demonstrates that the \$.35 default compensation rate previously adopted is grossly excessive and unjustified.

Finally, the Commission has no authority to make retroactive modifications to its vacated interim compensation plan. Despite arguments by some commenters that the Commission may "undo" the errors of its prior orders, the Supreme Court in *Bowen v. Georgetown University Hospital* flatly rejected the proposition that an agency may promulgate retroactive rules, even where such action is alleged to be "corrective." To the extent they were not overruled by *Bowen,* the tariff review cases cited by some commenters have no application to payphone compensation, which does not involve the Commission's review of tariffed rates. Accordingly, although the Commission is free to adopt a prospective "interim" compensation plan that affects all carriers (including small IXCs), it may not impose past payment obligations through retroactive rulemaking.

TABLE OF CONTENTS

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The Competitive Telecommunications Association ("CompTel") respectfully submits the following reply to the initial comments filed in the remand phase of this proceeding.

I. NON-COST BASED COMPENSATION IS INCONSISTENT WITH THE COURT'S REMAND

PSPs continue to argue that the Commission can set compensation without regard to the PSP's costs in originating access code and subscriber 800 calls. This proposition, however, is inconsistent with Section 276 and the D.C. Circuit's decision in *Illinois Public Telecomm Ass'n.*

In its initial decision, the FCC concluded that PSPs would be "fairly compensated" in accordance with Section 276 if they received a compensation amount sufficient to recover their costs for originating access code and subscriber 800 calls.[1] The so-called "market-

[1] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541, ¶¶ 67, 70 (1996) ("*R&O*").

based" local coin rate was adopted as a *surrogate* for determining these costs, based upon the conclusion -- found by the D.C. Circuit to be arbitrary and capricious -- that the costs of local coin calls were similar to the costs of access code and subscriber 800 calls.[2/]

The D.C. Circuit's decision is premised on the fundamental conclusion (which was not challenged by the PSPs) that to be "fair," compensation under Section 276 must reflect the PSP's costs. The Commission's error in adopting local coin rates as a "market based" surrogate was that it *failed* to take cost differences -- which even APCC conceded were present -- into account. Yet the PSPs urge the Commission to "comply" with this remand by ignoring the PSPs' costs in favor of theories of "market pricing" and other surrogates which, like the local coin rate, involve significant costs not incurred in originating access code and subscriber 800 calls.

The RBOCs contend that FCC-prescribed compensation must be adjusted upward to replicate a presumed "market" pricing of access code and subscriber 800 calls. Their theory is that access code and subscriber 800 callers are *less* price sensitive than local coin callers, and that therefore the market would set a higher rate for access code and subscriber 800 calls.[3/] They urge the FCC to include an "adjustment" (*i.e.*, a surcharge) to reflect "inverse elasticity pricing" that allegedly would result in the market.[4/] Separate and apart from the fact that the notion of an omnipotent regulator seeking to mimic efficient "market" adjustments is fundamentally inconsistent with the deregulatory approach the RBOCs so often

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[2/] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 21223, ¶ 71 (1996) ("*Recon.*").

[3/] RBOC/GTE/SNET Coalition Comments at 21-22.

[4/] *Id.*

advocate, their approach must be rejected because it contradicts TOCSIA. In TOCSIA, Congress clearly rejected the idea that PSPs were entitled to price access code calls on a free market basis. If Congress had wanted to permit PSPs to exercise market power over access code callers, it would *not* have prohibited PSPs from blocking such calls or prohibited PSPs from assessing greater charges on access code callers to originate a call than 0+ callers are assessed.[5/] Thus, whatever power PSPs might derive from any asserted differences in demand elasticity of access code and subscriber 800 calling, it cannot form an appropriate basis for setting a fair compensation amount under Section 276.

APCC argues that the Commission should look to three other "surrogates" (in addition to the local coin rate) in order to establish a zone of reasonableness for the compensation amount.[6/] According to APCC, examination of these "surrogates" -- OSP 0+ commission levels, 0- transfer rates, and PSP surcharges for 1+ sent-paid traffic -- yields the conclusion that the $.35 default rate was in the right range after all.[7/] However, APCC's approach is no better than using local coin rates as a surrogate because, like the local coin rate, each of APCC's proposed surrogates involve dissimilar costs compared to access code and subscriber 800 calls.

0+ Commissions: The amount that an OSP will pay to be the 0+ carrier at a payphone is not a surrogate for PSP origination costs. As the Commission has recognized,[8/] 0+ commissions are a form of marketing. By being the 0+ carrier, an OSP gains access to

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[5/] See 47 U.S.C. §§ 226(c)(1)(B) and (c)(1)(C).

[6/] APCC Comments at 7.

[7/] *Id.*

[8/] *National Telephone Services, Inc.*, 8 FCC Rcd 654, 655 (1993).

customers that have not previously established a relationship with the carrier. Thus, an OSP will pay for this right because it is another way to attract new customers, comparable to print or media advertising.[9] This is not an appropriate surrogate because 0+ commissions include these advertising costs, while a carrier still must incur advertising expenses to induce callers to dial an access code (and a 800 customer must expend resources to publicize its toll-free number). To the contrary, use of 0+ commissions will overcompensate PSPs for their costs.[10]

0- transfer rates: The 0- transfer rate is a fee LECs charge OSPs when the LEC operator must first handle a call and ascertain the customer's preferred long distance carrier. Such calls by definition involve live operator intervention. By contrast, the origination of access code or subscriber 800 calls does not require operator intervention.[11] Therefore, compensation based on 0- transfer rates also would overcompensate PSPs.

Sent-paid surcharges: The final surrogate APCC suggests is the additional set-up charge (over and above the per-minute rate) assessed when a caller pays for a long distance call by placing coins in the telephone. However, the costs associated with these calls in no way even approximate a PSP's costs for originating an access code or subscriber 800 call.

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[9] Indeed, as the Commission noted, the placard on the telephone can itself be advertising of the OSP's services. *R&O* at ¶ 69.

[10] In this regard, it should be noted that APCC argued extensively in its July 1, 1996 comments in this docket that then-existing rules forced 0+ commissions to "subsidize" all other calls from a payphone. APCC July 1, 1996 Comments at 5-9. If PSPs treated 0+ commissions this way, then use of that amount (which would have had to be grossly inflated in order to act as a subsidy) in determining compensation would constitute double recovery for the PSP.

[11] Although live operators sometimes handle access code calls, these costs are borne by the IXC, not the PSP, and paid for through the charges assessed upon the caller.

The sent-paid capability of a payphone requires a number of significant and additional costs (over and above transmission costs) to rate the calls in real time, to monitor call duration, and to detect whether (and how many) coins have been deposited. Often, these functions require additional, frequently expensive, signalling and trunking arrangements. Indeed, CompTel believes that only two carriers, AT&T and Amnex, have deployed signalling networks sufficient to process 1+ calls from LEC payphones.[12] None of these costs are incurred by the PSP in originating access code or subscriber 800 calls. Rather, the carrier that receives the access code or subscriber 800 call must rate and record it for billing purposes.

In summary, none of the alternative bases that APCC suggests may be used as a surrogate for PSP costs. Each alternative involves costs that are unrelated to, and not incurred in, originating access code or subscriber 800 calls. As explained below, the Commission simply cannot accomplish indirectly through surrogates what Section 276 and the D.C. Circuit's decision require it to do: set a fair compensation amount which reflects the costs PSPs incur in originating access code and subscriber 800 calls.

II. APPLYING AN APPROPRIATE COST-BASED APPROACH, COMPENSATION SHOULD BE SET AT NO MORE THAN 10 CENTS PER CALL

The Commission's task is to establish a cost-based compensation amount in this remand proceeding. In its initial comments, CompTel recommended two approaches to establishing compensation, one based upon a PSP's incremental costs in originating access

[12] The AT&T Consent Decree permits OSPs to split the 1+ PIC from the 0+ PIC; thus, carriers need not process 1+ calls in order to provide 0+ services from LEC payphones.

code and subscriber 800 calls, or in the alternative, a direct cost approach reflecting those calls incurred directly in originating all calls from payphones. The initial comments establish that an incremental cost approach compensates PSPs for their costs in originating access code and subscriber 800 calls while also ensuring that PSPs are fully compensated for all calls originating from their payphones. An appropriate compensation amount based on incremental cost is less than $.05, while a direct cost approach produces a compensation amount of $.10 per call.

A. Compensation That is Based on Incremental Costs Will Fully and Fairly Compensate PSPs.

In the proceeding prior to the remand, and in its initial comments on remand issues, CompTel recommended that compensation for access code and subscriber 800 calls be based upon the PSP's incremental costs in originating these calls. The record now before the Commission confirms that such an approach is fully compensatory to PSPs and is "fair" to all parties.

Initially, CompTel's proposed incremental cost standard is not the straw man that the Commission rejected previously in this proceeding, as some commenters would have the Commission believe. CompTel does not propose that incremental costs be used to determine compensation for *all* calls originating from payphones. The Commission correctly concluded that such a standard, if applied to all payphone calls, might undercompensate PSPs on its total returns.[13/] By contrast, CompTel's proposal fully compensates PSPs both for each access code or subscriber 800 call and for every call placed from the phone through a

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[13/] *R&O* at ¶ 68.

combination of market pricing for the 80 percent of calls subject to market forces, and incremental costs for the remaining calls for which FCC-prescribed compensation is due. By allowing PSPs full flexibility in establishing local coin call rates, and flexibility (subject to traditional regulatory oversight) in negotiating 1+ call rates and 0+ commissions, the statutory objective of ensuring fair compensation for all calls (collectively) is met. Incremental cost-based compensation for the remaining calls ensures that each call earns at least a fair amount of compensation for the PSP.

In fact, the PSPs' own data shows that they easily can recover most, and in some cases all, of their claimed total costs *solely* from local calls and 1+ coin calls.[14] Assuming that the average payphone generates 511 coin calls per month, and making the "reasonable assumption" (according to APCC)[15] that 10 percent of these calls are 1+ sent-paid calls, a PSP can expect to receive $161.00 per month at the FCC's presumed market local coin rate of $.35/call (460 x $.35)[16] and at least $71.40 per month in call surcharges (using APCC's estimate of the "average" surcharge for 1+ sent-paid calls (51 x $1.40).[17] Thus, from these two sources alone, a PSP can expect at least $232.40 per month in revenues. This

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[14] This is not surprising, given that several PSPs have confirmed that their decision to install a public payphone is driven by the amount of local traffic that will be generated from the phone. *See* Peoples Telephone Comments at 6 ("Peoples will not install payphones in locations that do not generate substantial numbers of coin calls"); Sprint Comments at 4 (quoting an independent PSP to the same effect).

[15] APCC Comments at 10 n. 10.

[16] The PSP can generate even more revenue if local coin calls are priced by the minute, rather than flat rated, or if calls of longer durations require the deposit of additional coins. Both pricing decisions are permitted by the Commission's decision to deregulate the local coin rate.

[17] APCC Comments at 10. Again, this estimate is conservative, for it assumes that a PSP does not generate any profit from the per-minute rate for sent-paid calls.

compares favorably to the costs, exclusive of 0+ commission payments, claimed by APCC ($197 per month),[18] CCI ($224.43 per month)[19] and Peoples Telephone Company ($238.41).[20] Moreover, this analysis does not take into account the substantial over-statement of PSP costs which are explained in the following section. When these inflated costs are adjusted for, it becomes even more clear that a PSP is fully capable of recovering all of its fixed costs from local and 1+ coin calls.

The record reveals that a PSPs' incremental costs for originating access code or subscriber 800 calls is in fact quite small. Using the approach CompTel recommended (comments at 13), the incremental cost of these calls is composed of (1) the additional usage charge (if any) imposed by a LEC for originating such calls, plus (2) additional maintenance expenses incurred as a result of increased usage of a phone. As to the first input, the record establishes that many LECs are moving toward flat-rate pricing of local calls, which arguably establishes an incremental cost of $0 for access code and subscriber 800 calls. CompTel would not object to applying the "average" per-call usage charge in areas where measured usage is employed, which the PSPs claim is approximately $.02 to $.03 per call.[21] There is no evidence in the record regarding the second input, however. Given that the *total* cost

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[18] APCC Comments at Attachment 3.

[19] CCI Comments at 9-10 (direct costs per call multiplied by the number of calls reported therein).

[20] Peoples Comments at 10.

[21] APCC Comments at 13 (local usage charges average $.03 per call); RBOC/GTE/SNET Coalition Comments at 16 ($.02 per call). Although flat rated pricing does not result in any increased cost, the flat-rated charge arguably includes a factor estimating the additional usage charges that would be incurred under measured usage. As a result, one could argue that flat-rated charges already include the $.02 to $.03 per call charge.

of maintenance (excluding the coin capability) is approximately $.029 per call (see infra, p. 14), the maximum incremental cost most likely would be in the $.01 to $.02 range. Thus, compensation should be equal to approximately $.03 to $.05 per call.

Several PSPs resurrect the claim that the Commission must set a high compensation rate in order to prevent the widespread withdrawal of payphones.[22] This argument does not withstand scrutiny. First, it is illogical to assume that payphones which *already* have been installed under a system where no compensation is paid for the calls in question would be removed as a result of a system which increases the PSPs' revenues (regardless of how large or small this increase is). Indeed, the record demonstrates that PSPs decide whether to install a payphone (and presumably, therefore, whether to keep it in service) *without regard to the number of access code or subscriber 800 calls it generates.*[23] The ability of PSPs to price local coin calls on a deregulated basis will only increase its ability to maintain payphones in service, regardless of the access code or subscriber 800 compensation rates. Second, to the extent that the RBOCs' claims are based upon a belief that payphone subsidies supported these phones, it does not follow that replacement of these subsidies will lead to the removal of payphones. All carriers have a mix of high volume and low volume locations, some of which, viewed in isolation, may be "unprofitable." It is both rational and permissible for a competitor to choose to continue to serve a particular "unprofitable" location, due to other benefits that accrue from serving the phone.[24] Third,

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[22] *See, e.g.* RBOC/GTE/SNET Coalition Comments at 14.

[23] *See, e.g.*, Peoples Comments at 6 ("Peoples will not install payphones in locations that do not generate substantial numbers of coin calls").

[24] For example, many large aggregators, such as airports, convention centers or hotels,
(continued...)

to the extent that some payphones might be removed from service *and* such payphones "are provided in the interest of public health, safety and welfare" (as opposed to the removal of payphones for which there never was a valid economic reason to install it), the Commission has the power to protect such phones through its policies and procedures for "public interest" telephones.[25] Such public interest phones should be addressed directly, through a narrowly targeted support program, rather than through a broad policy of requiring "high" compensation rates.[26]

B. Even Under a Direct Cost Approach, Compensation for Access Code and Subscriber 800 Calls Should Not Exceed $.10 Per Call.

If the Commission were to consider a PSP's forward-looking direct costs, rather than its marginal costs, compensation should be set at no more than $.10 per call. PSPs have submitted cost data which in general are inflated and unreliable, due primarily to the inclusion of cost items which are irrelevant to the origination of access code and subscriber 800 calls. When these costs are removed, the PSPs' data demonstrates that the cost of an access code or subscriber 800 call is less than 10 cents per call.

1. The PSPs' Cost Figures are Inflated and Unreliable

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[24](...continued)
require that the PSP install certain numbers of payphones in specified locations, some of which may not generate significant call volumes. LECs can continue to decide whether the benefit of the overall contract justifies installation of these "unprofitable" payphones also.

[25] 47 U.S.C. § 276(b)(2).

[26] Even assuming that support is necessary for a public interest payphone, there is no justification for the PSPs' proposal that only access code and subscriber 800 callers contribute toward this support.

Not unexpectedly, PSPs have submitted cost data purporting to demonstrate that their actual costs are well in excess of even the $.35 local coin rate the FCC presumed would predominate. The PSPs reach these large cost figures, however, by including costs that are not related to access code or subscriber 800 calls. Each cost category claimed by PSPs is discussed below.

Payphone Line Charges: While PSPs generally claim that the basic payphone line is flat-rated, many include in the "line cost" category charges associated with long distance usage and other charges not related to the basic payphone line. For example, Peoples Telephone claims a cost of $59.54 per month in "line charges," but its 10-K report to the SEC (upon which its figures purportedly are based) reveals that this category includes not only local payphone line charges, but also "long distance transmission charges," "network costs," and "billing, collection and validation costs."[27] All of these costs are incurred as a result of Peoples' decision to self-provide long distance and operator services from some of its payphone locations.[28] The charges, therefore, should not be included in the compensation amount. Instead, AT&T's estimate of basic payphone line rates (including blocking, screening and local usage) of $32.73 appears to include only line-related costs.[29]

Premises Owner Commissions: This item, often the single largest "cost" claimed by PSPs, reports the percentage PSPs pay for 0+, 1+ and local coin revenues generated from the payphone. The entire cost should be excluded from compensation for access code

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[27] Peoples Telephone Company, 10-K at 28 (3/31/97) (excerpts attached as Exhibit 1).

[28] *Id.* at 27 ("The Company uses its private label operator service or a third-party operator service provider based on which service the Company believes nets its highest gross margin from the call").

[29] AT&T Comments at 11.

or subscriber 800 calls for two reasons. First, these commissions typically have been paid solely on 0+, 1+ and local calls, and recovered through these revenues.[30] They typically are not paid on access code or subscriber 800 calls, and such calls should not be required to contribute toward the recovery of this expense. Second, there has not been any determination by the FCC that the level of these commissions are just and reasonable. The Commission cannot lawfully include excessive or unreasonable costs in its calculation of the costs of access code and subscriber 800 calls. Unless the Commission is prepared to conduct a rate hearing to determine what a "reasonable" commission level is, it therefore must exclude commission expenses from the cost calculation. Indeed, to allow PSPs to pass through these commission expenses, without a determination of their reasonableness, makes PSPs indifferent to the actual level of commission paid and would invite a bidding war in which each PSP bids up its commissions without any upper-bound restraint.[31] This would not promote the public interest, and would lead to excessive compensation for access code and subscriber 800 calls.

Field Service/Coin Collection: It is undisputed that it is more expensive for a PSP to service and maintain a coin phone than a coinless phone. This is because coin phones require more frequent service visits to collect coins and involve additional equipment that often breaks and/or is vandalized. The PSPs' cost figures typically include all field service

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[30] *See, e.g.*, CCI Comments at 12 (noting that many of its current contracts do not provide for commissions on access code or subscriber 800 revenues).

[31] In any event, the PSPs allocate these commission expenses improperly among calls. As the PSPs readily admit, commissions typically are paid as a percentage of *revenues* generated. *See, e.g.*, Peoples Telephone 10-K, at 28. It follows, therefore, that the costs of such commissions should be allocated among calls based upon their anticipated revenues, not the number of calls. Higher revenue calls, such as 0+ calls, should bear the greatest proportion of the costs of premises owner commissions.

costs, and therefore are inflated because coin collection costs are included. According to one PSP, coin costs are 50 percent or more of total field service costs.[32] Thus, the total field service costs reported by Peoples and CCI should be reduced by at least 50 percent (from the $41.66 and $35.70 claimed, respectively).[33] This yields a field collection cost of between $17.85 and $20.83 per month. In the alternative, these costs, exclusive of the coin collection costs, can be estimated using AT&T's experience with its coinless phones, which average $25.10 in maintenance, warehousing/parts, and field technician support.[34]

Billing Costs/Bad Debt: Peoples inexplicably includes a line item for "billing costs/bad debts."[35] This cost, like the excessive line charges Peoples included, appears to relate to Peoples' operation as a long distance and operator service provider, not as a payphone provider. Accordingly, the $4.02 per month claimed by Peoples for "billing costs/bad debt" should be excluded.

Depreciation and Interest: Some PSPs appear to include a grossly inflated replacement cost for its payphones. For example, Peoples Telephone claims monthly depreciation costs (amortized over a 10 year period) of $64.33 per payphone.[36] This computes to an average undepreciated cost of $7,719.60 per payphone, far in excess of the record evidence of the cost of a payphone. Viewed another way, Peoples' comments report

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[32] Telaleasing Enterprises, Inc. Comments at 8.

[33] Peoples Comments at 10; CCI Comments at 10.

[34] AT&T Comments at 11.

[35] Peoples Comments at 10.

[36] *Id.*

a net payphone asset base of $124,433,108.[37] Yet, Peoples' installed payphone base is only 38,500 phones,[38] which yields an average payphone cost of $3,232 per payphone. Given the substantial evidence elsewhere in the record that new payphones cost between $200 and $1,000, and can be installed for $500 to $800,[39] Peoples' estimates must include other costs not related to the payphone itself.

2. A PSP's Direct Costs in Originating Access Code and Subscriber 800 Calls Are Less Than 10 Cents Per Call

When these overstatements are taken into effect, the direct costs of an access code or subscriber 800 call are as follows:

Cost Category	Per Payphone per month	Per call cost (Assuming 713 calls/month)
Basic Payphone Line	$32.73	$.046
Field Service/Maintenance	$20.83	$.029
Depreciation/Interest	$7.83	$.011
10 percent profit	$6.14	$.009
Total	$67.53	$.095

Accordingly, the Commission should set a compensation rate no greater than 10 cents/call for access code and subscriber 800 calls.

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[37] *Id.* at 10 n.***.

[38] Peoples 10-K at 3.

[39] *See, e.g.*, AT&T Comments, Robinson Aff. at 3.

III. THE FCC CANNOT "CURE" THE DEFECT IN ITS INITIAL RULES BY APPLYING A NEW RULE RETROACTIVELY

A number of commenters addressed the Commission's ability to retroactively "true-up" interim compensation payments. Although a number of them disagreed on the circumstances under which the Commission should retroactively adjust compensation obligations, they each contended that the Commission's power is discretionary.[40] This proposition is erroneous.

As CompTel explained in its initial comments, the Commission's ability to promulgate a rule that applies retroactively is governed by the Supreme Court's decision in *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988).[41] In *Bowen*, the Court held that an agency does not have authority to engage in retroactive rulemaking, absent a clear and express grant of such authority by Congress. *Id.* at 208. Because neither Section 276 nor any other applicable provision of the Communications Act authorizes the FCC to promulgate compensation rules retroactive to November 1996, the Commission may adopt compensation rules with prospective application only.

Relying on a line of cases involving the Federal Energy Regulatory Commission ("FERC"), AT&T and Sprint contend that the Commission has broad equitable powers to "undo" its error through retroactive rulemaking, citing *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223 (1965).[42] Neither AT&T nor Sprint cites, much

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[40] *See, e.g,* APCC Comments at 19-20; AT&T Comments at 24-26; Sprint Comments at 16-17.

[41] *See,* CompTel Comments at 8-10.

[42] AT&T Comments at 24; Sprint Comments at 16.

less distinguishes, the Supreme Court's decision in *Bowen*, which clearly precludes retroactive application of rules invalidated upon judicial review. As Justice Scalia emphasized in his concurring opinion in *Bowen*, to allow an agency to re-promulgate a rule as if the rule had never been invalidated would "make a mockery" of the A.P.A.'s requirements. *Bowen*, 488 U.S. at 225; *see Bowen* at 208 (majority opinion) (even where "substantial justification" is presented for retroactive rulemaking, "courts should be reluctant to find such authority"). Accordingly, to the extent that *Callery* suggested an agency possessed retroactive rulemaking authority, the Supreme Court's later decision in *Bowen* overruled that holding.[43/]

Moreover, whatever the continued validity of *Callery*, it is limited to the tariff review context. Thus, it does not provide the FCC with authority to retroactively modify carriers' payphone compensation obligations when it is acting outside of its powers to review carrier-initiated tariffs. In *Callery* and the other FERC cases cited by AT&T and Sprint, the agency was acting pursuant to its authority to review carrier-initiated tariffs and it first adopted an order permitting the rates to go into effect subject to the outcome of a rate hearing.[44/] In the present docket, the Commission is not acting in response to tariffs filed by the PSPs, nor has it suspended a tariff and/or imposed an accounting order pursuant to its

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[43/] As CompTel explained in its initial comments, the facts of *Bowen* directly parallel the payphone proceeding. In *Bowen*, as here, the agency initially promulgated a rule, had that rule vacated on appeal, and then attempted to reimpose the rule "as if the original rule had never been set aside." *Bowen*, 488 U.S. at 207. In *Bowen*, the Supreme Court rejected the proposition that an agency has this authority.

[44/] *See Callery*, 382 U.S. at 226 (describing the agency's order initiating an area rate proceeding); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1072 (D.C. Cir. 1992) (agency accepted tariff filing "subject to" outcome of an ongoing rate proceeding).

authority under Section 204(b).[45] Therefore, even if *Callery* remains valid in light of *Bowen*, the authority it confers is not applicable here.

Further, neither *Callery* nor its progeny address the situation where new entities, not originally subject to *any* payment obligation, were retroactively added to a compensation scheme. To the contrary, in the *Callery* cases, the agency had defined the universe of affected carriers properly, and all affected carriers were on notice that the rate they paid was subject to change. Here, on the other hand, retroactive modification of the interim plan would have the effect of adding new carriers who would now be assessed payment obligations based upon their past actions. In fact, not only were the carriers not given proper notice, they were affirmatively instructed that they would not incur any obligation for this period. It would be patently unfair to reverse course at this time and subject carriers that relied on the FCC's earlier order to a penalty for their reliance.[46] While the Commission is free to change its mind going forward and include small IXCs in a prospective compensation plan, it cannot retroactively impose obligations upon them, as if they were originally included in the compensation plan.

For similar reasons, APCC's citation to refund cases is inapposite.[47] Tariff-review concepts such as the Commission's refund authority simply do not come into play in establishing compensation under Section 276, where the Commission is not setting carrier rates pursuant to Sections 204 and 205 of the Act. Section 276 requires the FCC to

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[45] 47 U.S.C. § 204(b).

[46] Carriers have no way of retroactively recovering the increased costs from their customers.

[47] APCC Comments at 19.

"promulgate rules" to establish a per-call compensation system; *Bowen* denies the Commission the power to do so retroactively.[48]

Respectfully submitted,

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Washington, D.C. 20036
202-296-6650

September 9, 1997

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[48] CompTel agrees with AT&T, however, that those carriers who paid compensation under the now-vacated compensation rules are entitled to a full refund (less what they owe pursuant to the prior $6 per phone per month plan). Because the payphone compensation rules have been vacated, carriers were not under a valid obligation to pay such compensation. They now may recover those overpayments in the form of refunds or an offset against future compensation. Indeed, one of the most likely reasons carriers did not seek a stay of the FCC's compensation rules is that monetary damages typically are not considered "irreparable harm" precisely because any overpayments can be reimbursed after the fact.

48880.41

Exhibit 1

Peoples 10-K
FY ended 12/31/96

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ACCESSION NUMBER: 0000819694-97-000004
CONFORMED SUBMISSION TYPE: 10-K405
PUBLIC DOCUMENT COUNT: 10
CONFORMED PERIOD OF REPORT: 19961231
FILED AS OF DATE: 19970331
SROS: AMEX

FILER:

COMPANY DATA:
COMPANY CONFORMED NAME:PEOPLES TELEPHONE COMPANY INC
CENTRAL INDEX KEY:0000819694
STANDARD INDUSTRIAL CLASSIFICATION:COMMUNICATION SERVICES, NEC [4899]
IRS NUMBER: 132626435
STATE OF INCORPORATION:NY
FISCAL YEAR END: 1231

FILING VALUES:
FORM TYPE: 10-K405
SEC ACT: 1934 Act
SEC FILE NUMBER: 001-12443
FILM NUMBER: 97571637

BUSINESS ADDRESS:
STREET 1: 2300 NORTHWEST 89TH PL
CITY: MIAMI
STATE: FL
ZIP: 33172
BUSINESS PHONE: 3055939667

MAIL ADDRESS:
STREET 1: 2300 NORTHWEST 89TH PLACE
CITY: MIAMI
STATE: FL

ZIP: 33172
</SEC-HEADER>
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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES
EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 1996 Commission File Number: 0-16479

PEOPLES TELEPHONE COMPANY, INC.
(Exact Name of registrant as specified in its charter)

NEW YORK 13-2626435
(State or other jurisdiction of incorporation or organization) (I.R.S. Employer Identification No.)

2300 NORTHWEST 89TH PLACE, MIAMI, FLORIDA 33172
(Address of principal executive offices) (Zip Code)

Registrant's telephone number: (305) 593-9667

Securities registered pursuant to Section 12(g) of the Act:

Name of each exchange
Title of each class on which registered

Common Stock
Par Value $.01 per share American Stock Exchange, Inc.

Securities registered pursuant to Section 12(b) of the Act:
(Title of class)
None

Indicate by check mark whether the registrant has (1) filed all reports required to be filed by Section 13 or 15(d) the Securities Exchange Act of 1934 during